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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:	Group No.: 3643
MILLER et al.	
Application No.: 10/806,223	Confirmation No.: 1747
Filed: March 23, 2004	Examiner: Rowan, K.
Title: COUNTERFLOW INSECT TRAP	

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BRIEF ON APPEAL

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I. INTRODUCTION

This Appeal is from an Office Action mailed January 28, 2005, finally rejecting claims 1-123 of the above-identified patent application. This brief is in furtherance of the Notice of Appeal filed March 23, 2005.

A. Real Party in Interest - 37 C.F.R. §41.37(c)(1)(i)

The real party in interest for this Appeal and the present patent application is American Biophysics Corporation, by way of an Assignment recorded March 23, 2004, in the U.S. Patent and Trademark Office at Reel 015129, Frame 0089.

B. Statement of Related Appeals and Interferences - 37 C.F.R. §41.37(c)(1)(ii)

There are presently no pending appeals or interferences known to Appellant, Appellant's representatives, or the Assignee, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. There has previously been an appeal in Application No. 08/718,643, (now U.S. Pat. No. 6,286,249 "the '249 patent") , a grandparent of the present application. (Appeal No. 2000-1914, decided Jan. 29, 2001). A copy of the Board's decision is included in the Related Proceedings Appendix.

The International Trade Commission has adjudicated a dispute relating to U.S. Patent No. 6,145,243 ("the '243 patent"), U.S.I.T.C. Investigation No. 337-TA-498. The '243 patent is a continuation-in-part of the '249 patent. A copy of the Administrative Law Judge's Initial Determination is included in the Evidence Appendix as an exhibit to the Declaration of Raymond Iannetta. Because the document is well over 100 pages long, Appellant has not duplicated it in the Related Proceedings Appendix.

The '243 and '249 patents were also involved in a number of actions in District Court including American Biophysics Corporation v. Armatron International, Inc. Civil Action No. CA 01 520 L, U.S. District Court for the District of Rhode Island; American Biophysics Corporation v. Blue Rhino Corporation, Civil Action No. 03-334-L, U.S. District Court for the District of Rhode Island; and Blue Rhino (various entitites) v. American Biophysics Corporation, Civil Action Nos. 1:03CV00837, 1:03CV00767, and 1:04CV00012, U.S. District Court for the Middle District of North Carolina. Appellant is not aware of any decision or order in any of these proceedings which would have a bearing on, or be affected by, the Board's decision in this Appeal.

C. Status of Claims - 37 C.F.R. §41.37(c)(1)(iii)

Claims 1-123 are pending in the application. The rejection of all claims is appealed herein. Claims 1, 24, 39, 50, 83, and 112 are independent. Claims 2-23, 35-38 and 77 depend from claim 1, claims 25-34, 78 and 81 depend from claim 24, claims 40-49, 79 and 82 depend from claim 39, claims 51-76 and 80 depend from claim 50, claims 84-111 depend from claim 83, and claims 113-123 depend from claim 112.

D. Status of Amendments - 37 C.F.R. §41.37(c)(1)(iv)

An Amendment was filed in the U.S. Patent and Trademark Office on November 4, 2004. All claim amendments have been entered and are of record.

II. SUMMARY OF CLAIMED SUBJECT MATTER - 37 C.F.R. §41.37(c)(1)(v)

A. Features of the Invention

The invention relates to a device for capturing flying insects including an airflow generator (42) to generate an outflow (50) including an insect attractant and an inflow (48). An outflow opening (20) communicates with the airflow generator, enabling the outflow to flow outwardly from the device and spread downwardly and radially from the device. An inlet opening (32) likewise communicates with the airflow generator and is positioned vertically higher than the outlet opening. The airflow generator draws the inflow into the trap by way of the inlet opening so that insects (64) intersecting the inflow are drawn into the trap. The airflow generator generates the inflow and the outflow in a counterflow relationship such that outside of the device, an overlapping region of the inflow overlaps a portion of the outflow and flows substantially counter to the overlapped portion of the outflow.

The invention likewise relates to a method including generating an outflow including an insect attractant dispersed therein which flows outwardly from a device and spreads downwardly and radially from the device. The method also includes generating an inflow flowing into the device such that insects intersecting the inflow are drawn into a trap portion of the device. The inflow and outflow are generated in a counterflow relationship such that outside of the device, an overlapping region of the inflow overlaps a portion of the outflow and flows substantially counter to the overlapped portion of the outflow.

Another aspect of the invention does not require the counterflow relationship as described above. In this aspect of the invention, the device is constructed such that the inflow extends substantially to or below an elevation of the outflow opening.

Embodiments of the invention relate to particular geometries of the outflow opening, the inflow opening, the attractant generating structures, attractant types, and positions of the airflow generating structures.

B. The Independent Claims on Appeal

The following explanation of the claimed subject matter, with reference to the specification and drawings, is for explanation only. The invention is not limited to the disclosed embodiments.

1. Claim 1

Independent claim 1 recites a device for capturing flying insects that includes an insect trap (10), and an airflow generator (42) that generates an outflow (50) including an insect attractant and an inflow (48). An outflow opening (20) communicates with the airflow generator and enables the outflow to flow outwardly from the device and spread downwardly and radially (FIG. 1) from the device. An inlet opening (32) likewise communicates with the airflow generator and is positioned vertically higher than the outlet opening. The airflow generator draws the inflow into the trap by way of the inflow inlet opening so that insects (64) intersecting the inflow are drawn into the trap. The airflow generator generates the inflow and the outflow in a counterflow relationship such that outside of the device, an overlapping region of the inflow overlaps a portion of the outflow and flows substantially counter to and immediately adjacent the overlapped region of the inflow.

2. Claim 24

Independent claim 24 recites a method for capturing flying insects using a device that includes an insect trap. The method includes generating an outflow (50), including an insect attractant dispersed therein, flowing outwardly from the device spreading downwardly and radially (FIG. 1) from the device. The method further includes generating an inflow (48) flowing into the trap such that insects intersecting the inflow are drawn into the trap. The inflow and the outflow are generated in a counterflow relationship wherein, outside the device, an overlapping region of the inflow overlaps an overlapped region of the outflow and flows substantially counter to and immediately adjacent the overlapped region of the outflow.

3. Claim 39

Independent claim 39 recites a method for capturing flying insects using a device that includes a trap. The method includes generating an outflow (50) including an insect attractant dispersed therein. The outflow flows outwardly from the device and spreads downwardly and radially from the device (FIG. 1). The method also includes generating an

inflow (48) flowing such that insects intersecting said inflow are drawn into said trap. The inflow and the outflow are generated in a counterflow relationship wherein, outside the device, an overlapping region of the inflow overlaps an overlapped region of the outflow and flows substantially counter to the overlapped region of the outflow.

4. Claim 50

Independent claim 50 recites a device for capturing flying insects including an insect trap (10), and an airflow generator (42) that generates an outflow (50) including an insect attractant dispersed therein and an inflow (48). The device has an outflow opening (20) communicated to the airflow generator. The outflow opening enables the outflow to flow outwardly from the device and spread downwardly and radially from the device (FIG. 1). The device also includes an inlet opening (32) communicated to the airflow generator and the insect trap and is positioned vertically higher than the outlet opening. The airflow generator draws the inflow into the trap via the inlet opening such that insects intersecting the inflow are drawn into the trap. The airflow generator generates the inflow and the outflow in a counterflow relationship wherein, outside the device, an overlapping region of the inflow overlaps an overlapped region of the outflow and flows substantially counter to the overlapped region of the outflow.

5. Claim 83

Independent claim 83 recites a device for capturing flying insects including an insect trap (10) and an airflow generator (42) that generates an outflow (50) including an insect attractant dispersed therein and an inflow (48). The device further includes an outflow opening (20) that communicates with the airflow generator, and enables the outflow to flow outwardly from said device (FIG. 1). The device also includes an inflow opening (32) that also communicates with the airflow generator and the insect trap. The airflow generator draws the inflow into the trap such that insects intersecting the inflow are drawn into the trap and such that, outside the device, the inflow extends substantially to or below an elevation of the outflow opening (FIG. 1).

6. Claim 112

Independent claim 112 recites a method for capturing flying insects using a device for including an insect trap (10). The method includes generating an outflow (50), including an

insect attractant dispersed therein, that flows outwardly from an outflow opening (20) on the device. The method also includes generating an inflow (48) flowing into the trap such that insects intersecting the inflow are drawn into the trap. The inflow and the outflow are generated such that, outside said device, the inflow extends substantially to or below an elevation of the outflow opening (FIG. 1).

III. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL – 37 C.F.R. § 41.37(c)(1)(vi)

In the January 28, 2005 Final Office Action, claims 1-123 were rejected under 35 U.S.C. §103(a) based on Cheshire (U.S. Pat. No. 5,255,468) (hereinafter "Cheshire") in view of Waters (U.S. Pat. No. 4,506,473) (hereinafter "Waters").

Additionally claims 1-123 were rejected under the judicially created doctrine of double patenting over claims 1-50 of U.S. Patent No. 6,286,249 (hereinafter "the '249 patent").

Thus, the grounds of rejection to be reviewed on appeal are:

1) whether claims 1-123 are obvious under 35 U.S.C. §103(a) based on Cheshire in view of Waters; and

2) whether the terminal disclaimer filed on November 4, 2004 obviates the double patenting rejection.

IV. ARGUMENT - 37 C.F.R. §41.37(c)(1)(vii)

A. Summary of the Argument

1. The Claims are not Obvious in View of the Cited References

Appellant respectfully submits that the claims of the present application are patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all of the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness. Cheshire does not teach or suggest the claimed counterflow relationship between the inflow and outflow, as recited in independent claims 1, 24, 39 and 50, nor does it teach or suggest the claimed relationship between the inflow and outflow in which the inflow extends substantially to or below an elevation of the outflow opening as recited in claims 83 and 112. The secondary reference, Waters, fails to overcome these deficiencies. Moreover, Appellant submits that there is no motivation to combine the

references, and that the evidence of commercial success constitutes strong evidence of the non-obviousness of the claimed invention.

2. The Terminal Disclaimer Obviates the Double Patenting Rejection

Appellant has filed a Terminal Disclaimer on November 4, 2004 in response to the non-statutory double patenting rejection. The Final Action does not point out any procedural errors with respect to the Terminal Disclaimer. Therefore the non-statutory double patenting rejection has been overcome and the rejection should be withdrawn.

B. The Law Regarding Factual Inquiries to Determine Obviousness/Nonobviousness Under 35 U.S.C. § 103(a)

Several basic factual inquiries must be made to determine obviousness or non-obviousness of patent application claims under 35 U.S.C. § 103. These factual inquiries are set forth in *Graham v. John Deere Co.*, 383 US 1, 17, 148 USPQ 459, 467 (1966):

> Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or non-obviousness of the subject matter is determined.

Application of this test, however, involves a factual inquiry. As stated by the Federal Court in *In re Ochiai*, 71 F.3d 1565, 37 USPQ2d 1127, 1131 (Fed. Cir. 1995):

> [T]he test of obviousness vel non is statutory. It requires that one compare the claim's subject matter as a whole with the prior art to which the subject matter pertains. 35 U.S.C. § 103.
>
> The inquiry is thus highly fact-specific by design.... When the references cited by the Examiner fail to establish a prima facie case of obviousness, the rejection is improper and will be overturned. *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988) (emphasis added).

In rejecting claims under 35 U.S.C. § 103(a), an Examiner bears an initial burden of presenting a *prima facie* case of obviousness. A *prima facie* case of obviousness is established only if there is a suggestion or motivation to combine reference teachings; a reasonable expectation of success; and the prior art references, when combined, teach or suggest all the claim limitations. If an Examiner fails to establish a *prima facie* case, a rejection is improper and will be overturned. *See In re Rijckaert*, 9 F.3d 1531, 28 USPQ2d 1955 (Fed. Cir. 1993). "If examination ... does not produce a prima facie case of unpatentability, then without more, the Applicant is entitled to the grant of the patent." *In re Oetiker*, 977 F.2d 1443, 1445-46, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

Furthermore, a basic mandate inherent in 35 U.S.C. § 103 is that "a piecemeal reconstruction of prior art patents in the light of appellant's disclosure" shall not be the basis for a holding of obviousness. *In re Kamm and Young*, 452 F.2d 1052, 172, USPQ 298, 301 (CCPA 1972). In addition, although references may be combined to show that a claim is unpatentable, they may not be combined indiscriminately. To determine whether a combination of references is proper, the following criterion is often used: namely, whether the prior art suggests doing what an applicant has done. It is not enough for a valid rejection to view the prior art in retrospect once an applicant's disclosure is known. *In re Skoll*, 523 F.2d 1392, 187 USPQ 481, 484 (CCPA 1975). Evidence of a proper motivation is required to support a prima facie case of obviousness. *See In re Fine*, 837 F.2d 1071, 1074-75, 5 U.S.P.Q.2d 1596, 1598-99 (Fed. Cir. 1988) (holding that the Board of Patent Appeals & Interference erroneously upheld rejection of claims where prior art references failed to disclose a material limitation of the claims and that there was no evidence supporting the Board's assertion that the art showed a motivation or suggestion to combine references); see also M.P.E.P. § 2143.03. It is not sufficient to simply cite references that could be capable of being combined to establish the prima facie case of obviousness; instead the Examiner must establish a motivation or suggestion to combine the references as asserted. *See In re Mills*, 916 F.2d 680, 682-83, 16 U.S.P.Q.2d 1430, 1432 (Fed. Cir. 1990); *In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2d 1313, 1317 (Fed. Cir. 2000) (stating that PTO is required to cite evidence, either in the references themselves or in the knowledge generally available to one skilled in the art, to support assertions underlying the prima facie case of obviousness); see also M.P.E.P. § 2143.01.

Commercial success is a secondary factor that may be considered when making a determination of obviousness. *Graham*, at 17. In order for the commercial success of a product to be relevant, there must be a nexus between the commercial success and the claimed features. See *J.T. Eaton &Co. v. Atlantic Paste & Glue Co.*, 106 F.3d 1563, 1571, 41 USPQ2d 1641, 1647(Fed. Cir. 1997); *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392, 7 USPQ2d 1222, 1226(Fed. Cir. 1988). However, if the marketed product embodies the claimed features, and is coextensive with them, then a nexus is presumed and the burden shifts to the party asserting obviousness to present evidence to rebut the presumed nexus. See *J.T. Eaton*, 106 F.3d at 1571, 41 USPQ2d at 1647; *Demaco*, 851 F.2d at 1392-93, 7 USPQ2d at 1226. The presumed nexus cannot be rebutted with mere argument; evidence must be put forth. See *Demaco*, 851 F.2d at 1393, 7 USPQ2d at 1226-27

("It is thus the task of the challenger to adduce evidence .... [A]rgument and conjecture are insufficient.") (internal quotations and citation omitted).

C. Rejection Under 35 U.S.C. § 103(a)

1. The Cited References

a) Cheshire

Cheshire discloses an electric insect trap 8 having a body comprising an attractant portion 10, an upper housing 12, and a lower housing 15. A flange 11 extends a predetermined distance outwardly from the body of the device and serves as a cover and as an air flow directing means. Mounted to the flange plate 13 is an upper housing 12 which includes a mounting ring 14 by which the device may be suspended for use. Below the attractant portion 10 is a lower housing 15. The device includes an insect receiving port or opening 18 between the attractant portion 10 and the flange 11. The attractant portion 10 includes light bulb 16 for attracting insects to the vicinity of the apparatus. (See Col. 5, ln. 63 – col. 6, ln. 23).

The device includes an insect receiving opening 18 located in the space between the upper edge of the attractant portion 10 and the flange 11. Insects are urged into the apparatus 8 through the opening 18 by an air current established by a fan 19. The fan 19 is mounted inside the lower housing 15 in a vertical orientation, to establish an air flow inwardly through the opening 18 and downwardly through the lower housing 15. (Col. 7, ll. 7-14).

The device further includes an electric grid 20, comprising a pair of electrodes 20u, 20l, which are spaced apart in an amount sufficient to admit insect remains after electrocution. The electrodes 20u, 20l are energized at a voltage sufficient to kill insects such as mosquitoes that pass through the electrodes. (Col. 7, ll. 15-50).

Cheshire does not teach the use of any attractant within the air flow, but rather makes use of light bulb 16 for radiating light. In one alternate embodiment, an incandescent light bulb 42 is selected to produce radiant heat. In this embodiment, the air discharge is not downward, but rather outward near the top of the device. (Col. 11, ll. 28-66, Fig. 3).

b) Waters

Waters discloses a method of generating carbon dioxide for use in conjunction with an insect trap. The generating device 10 is associated with an insect trap 11. The device includes a container 12 which functions as a reaction chamber, a compartment 13 within the reaction chamber for containing an acid solution, a tube 14 connecting the reaction chamber

to the insect trap and a supporting attachment 15 for securing the generating device to said trap. In use, the compartment 13 is ruptured or collapsed so that the acid solution 17 may mix with a carbonate salt 16 to generate carbonic acid, which, in turn, decomposes to form carbon dioxide and water. The carbon dioxide flows from the reaction chamber 12 into the insect trap 11 by a connecting tube 14. (See Col. 2, ln. 52 – Col. 3, ln. 12).

2. Claims 1-123 are not obvious based on Cheshire in view of Waters

a) Claim 1

(i) The Final Rejection has Failed to Establish a Prima Facie Case of Obviousness

Appellant respectfully submits claim 1 is patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness.

Claim 1 recites a device for capturing flying insects that includes an airflow generator, an outflow opening and an inlet opening, the "airflow generator generat[es an] inflow and [an] outflow in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow."

This language in claim 1 defines a type of counterflow relationship between the inflow and outflow that requires an overlapping region of the inflow to (a) overlap an overlapped region of the outflow, and (b) flow substantially counter to and immediately adjacent the overlapped region of the outflow. Insects attracted to the outflow will use the outflow to find its source, which they believe is the location of prey. As a result of this relationship, insects attracted to the device by the outflow and intersecting the overlapping region of the inflow will be drawn into the insect trap. While the insects may meander somewhat in their flight path, it is believed that the overlapping relationship enhances the ability to capture insects.

This claimed relationship is completely lacking in Cheshire. The most relevant portion of Cheshire that describes how insects are drawn into its device is found at column 10, lines 3-47. Neither that portion of Cheshire nor any other portion of Cheshire discloses or even mentions the type of counterflow relationship recited in claim 1. Instead, Cheshire

discloses that insects are drawn in from within a "killing zone" defined by the rectangular area in Fig. 4 bordered by the dashed line and indicated by the point X. Fig. 4 is included below, along with Fig. 2 to illustrate the relationship between the "killing zone" and the trap as a whole. No overlapping relationship is disclosed between the inflow in this "killing zone" and the outflow flowing out the bottom of the device in Cheshire. Instead, the "killing zone" is illustrated as ending just at the bottom of the wider portion having light bulb 16 – meaning that the inflow in that "zone" is not overlapping and immediately adjacent the outflow at the bottom of the trap.

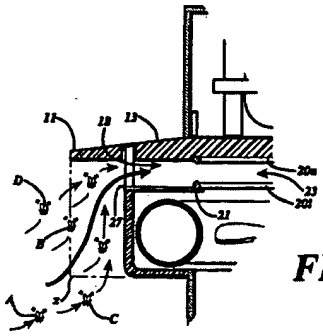

FIG 4

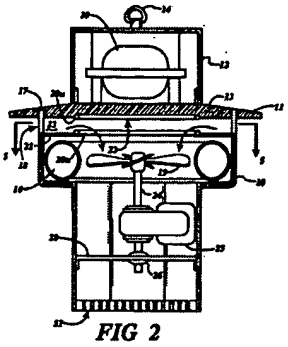

FIG 2

The final rejection argues that "Cheshire shows an inflow substantially counter to and immediately adjacent an upper portion of the plume and then into the trap such that insects are attracted to the outflow and flying along the upper portion of the plume towards the trap will intersect the inflow and be drawn into the inflow as discussed in column 2, lines 28-68 and column 8, lines 43-55." (Page 4). This is a mischaracterization of the teachings of Cheshire. The cited portion of column two merely teaches that it may be desirable to include an inflow that is directed generally upwards, to avoid fighting the lift of the mosquitoes' upward reflexes. (Col. 2, ll. 46-50). There is no discussion in column two of any relationship between an inflow and an outflow, nor does it teach or suggest that the two flows should be counter and adjacent to each other. Cheshire contains no information at all regarding where insects might fly in relation to the outflow plume as asserted in the final rejection. Neither does the section of column eight make up for the deficiencies of column 2. The referenced portion of column eight merely describes changes in the laminar inflow in the vicinity of flange 11. This inflow becomes turbulent at a distance from the flange 11 and mosquitoes already attracted to the device may be induced to engage in upward flight, thereby aiding the inflow in sucking the insects into range of the electric grid 20. These passages do not relate in any way to attracting insects to an outflow, nor to any counterflow relationship between the inflow and the outflow.

In fact, Cheshire fails to include any teaching at all regarding a role of the exhaust from the motor 25 in attracting insects. The only effect of the exhaust that is mentioned is that insects already attracted to the device may react to exhaust air flow by reflexively flying upward from beneath the device. (Col. 9, ll. 47-49). Instead, the primary airflow with which Cheshire is concerned is inflow. In particular, Cheshire seeks to ensure that the inflow is sufficient to suck in insects attracted by the light. (See, e.g., col. 8, ll. 24-55). In contrast to the "outflow comprising an insect attractant dispersed therein" as recited in claim 1 of the present application, the only attractant described in relationship to Cheshire's embodiment of Figures 1 and 2 is radiant light energy, generally in the ultraviolet portion of the spectrum, but also contemplating infrared wavelengths. (Col. 6, ll. 47-64). With respect to Cheshire's embodiment of Figure 3, radiant light energy is accompanied by the heat produced by an incandescent bulb and the motion of a rotating sleeve, but this embodiment still lacks any insect attractant dispersed within an outflow. (Col. 11, ll. 28-36, 60-66). Moreover, there is no teaching or suggestion in Cheshire (nor does the Office Action cite any such motivation) to combine aspects of these two embodiments in any way.

The Office Action fails even to allege that Cheshire teaches an outflow comprising an insect attractant dispersed therein.[1] To the extent that the Office Action relies upon "motion and heat" there is no explanation of how the motion and heat of the embodiment of Figure 3 relate in any way to the embodiment of Figures 1 and 2, nor any assertion that motion or heat comprise "an insect attractant dispersed" within an outflow that flows downwardly and radially from the trap.

Quite simply, this is because they do not. There is no teaching anywhere in Cheshire that the exhaust has a role in insect attraction. Further, there is no teaching anywhere in Cheshire that motion, light or heat are somehow "dispersed" within an outflow flowing downwardly and radially.[2]

The claim language "an insect attractant dispersed therein" clearly requires the attractant to be dispersed in the outflow as a part thereof. Light and heat cannot be part of a

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[1] Appellant notes that this failure amounts to a failure to make a *prima facie* case of unpatentability as at least one recited element is not addressed by the rejection.

[2] The Board has already considered the question of whether light can be considered to be an attractant in the outflow. (Appeal No. 2000-1914, decided January 29, 2001). In relation to App. No. 08/718,643, grandparent of the present application, the Board's consideration of DeYoreo (U.S. Pat. No. 5,301,458) made clear that light cannot be considered to be an attractant as recited in the claims of the then-considered invention. In that case, the Board contrasted the DeYoreo reference with the claimed invention by focusing on the difference between "an insect killer or attracting device which employs a light source to attract insects," and the "flow of insect attractant" of the then-claimed invention. Though Appellant has repeatedly cited this decision to the Examiner in the present case and its parent, the Examiner continues to rely on light as an attractant in rejecting Appellant's claims.

flow of air. Light can pass through the outflow, but cannot flow with the outflow and be dispersed therein as a part of the flow. Likewise, an outflow can be heated, but heat is not something that is dispersed into an outflow to become part of the outflow. Finally, the motion referred to in Cheshire is the rotational motion of the sleeve 44. (Col. 11, ll. 64-66). This motion clearly cannot be dispersed into the outflow or be a part of the outflow, it is restricted to the location of the sleeve.

Waters does not make up for the deficiencies of Cheshire. As described above, Waters merely teaches a device for producing carbon dioxide gas in conjunction with an insect trap. It does not teach any outflow or inflow, nor any relationship between the two. The carbon dioxide so produced flows upward through tube 14 into the trap. No mechanism is disclosed for causing this flow, nor for dispersing the carbon dioxide once it arrives in the trap. Presumably, in view of the dry ice technology described in the background, simple diffusion of the carbon dioxide will suffice for the purpose of Waters.

The final rejection states that, "it would have been obvious to provide Cheshire with a carbon dioxide attractant as shown by Waters to attract more insects to the trap." (Page 3). This conclusory statement is not supported by any evidence in the record and is merely a *post hoc* justification for picking and choosing elements of Waters to combine with elements drawn from multiple embodiments of Cheshire. As noted above, Cheshire does not teach that the outflow has anything at all to do with attracting insects. As a result, there can be no suggestion to add an attractant to the outflow, since Cheshire's outflow has nothing to do with insect attraction.

(ii) The Final Rejection has Failed to Give Due Weight to the Invention's Commercial Success

Finally, the final rejection takes the position that the lack of market share and advertising data renders Appellant's declaration insufficient to overcome the alleged *prima facie* obviousness of the claims. (See, e.g., pp. 6, 7). Appellant respectfully disagrees with the asserted standard as well as the application of the correct standard to the current facts.

Appellant first notes that the cases relied upon by MPEP §716, *Ex parte Standish*, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988) and *Cable Electric Products, Inc. v. Genmark, Inc.*, 226 USPQ 881 (Fed. Cir. 1985) each related to situations in which the evidence of commercial success was highly amorphous. They do not stand for the broad proposition that lack of market share and advertising expenses render evidence of commercial success irrelevant, as asserted in the Final Rejection. (See, p. 6).

In *Standish*, the inventor provided a sales number without any time frame and failed to relate the claims to the product sold. (*Standish*, at 1458). In *Cable Electric*, there was no indication that profitability or market share was out of the ordinary for the relevant industry. (*Cable Electric*, at 888).

In contrast to the evidence in those cases, Appellant's declaration includes seven years of specific sales data, along with a comparison between the price of Appellant's products and the other products on the market, noting that Appellant is able to sell at a much higher price than competing products due to the invention's effectiveness. (See, Declaration, p. 2). Furthermore, the statement includes a refutation of the relevance of market share data with particular reference to the very large difference in price between Appellant's products and the competing products. (See, Declaration, p. 3). Indeed, the Declaration points out that the Appellant's device sold for 10 to 25 times the price of products in the marketplace that were designed for the same purpose. Thus, unlike the applicant in *Standish*, Appellant has provided a time frame, and unlike the patentee in *Cable Electric*, Appellant has provided an indication that the invention was able to command a sales price that was out of the ordinary for the relevant industry. Furthermore, Appellant provided six articles produced by third-parties recognizing the commercial success of products relating to the pending claims, including one naming the real party in interest as the fastest growing private company in the United States, and five others describing the success that Appellant has had in the market. Finally, Appellant referenced a decision by the International Trade Commission in which that body made a finding of the commercial success of Appellant's devices.

In sum, Appellant's declaration and supporting materials provide sufficient basis to evaluate the commercial success of Appellant's products despite not providing specific advertising or market share data. The law of commercial success does not require advertising or market share data, but rather requires that "success must be shown to have in some way been due to the nature of the claimed invention." *Cable Electric*, at 888. Appellant's submission meets this standard and should be considered in evaluating obviousness in view of the Cheshire and Waters references.

Thus, for at least the reasons that Cheshire and Waters fail to teach or suggest the counterflow relationship between the inflow and the outflow as recited by claim 1 or an outflow having an insect attractant dispersed therein, claim 1 is submitted to be patentable, and Appellant respectfully requests that the rejection be withdrawn.

b) Claims 2-23, 35-38 and 77

Each of claims 2-23, 35-38 and 77 is separately patentable at least for the reasons given above with respect to claim 1 and for the additional features recited therein. Appellant notes that claims 9, 12, 19-21, and 36-37 appear to be the only ones of 2-23, 35-38 and 77 that are specifically addressed in the Final Rejection. To the extent that the other claims are not rejected with any specificity, Appellant submits that the Final Rejection fails to make a *prima facie* case of unpatentability and that these claims are therefore patentable.

With respect to claim 9, Cheshire does not teach anything regarding the position of the bag, merely stating that a collection bag may be used. With respect to claim 12, the alleged combination of Waters is treated in detail above and Appellant reiterates that the combination is improper and based only on hindsight picking and choosing of elements with Appellant's specification as a guide.

With respect to claim 20, Appellant submits that the Examiner's hindsight modification of Cheshire is erroneous. Cheshire does not teach that the exhaust has anything to do with attracting insects. Therefore, there would be no reason at all to "optimize" the outflow fan speed as suggested in the Final Rejection, the proposed optimization is simply a *post hoc* justification, unrelated to any teaching of the references.

With respect to claim 21, Appellant respectfully requests that the Examiner support with facts his assertion that use of a flexible mesh trap would be an obvious modification of Cheshire. See, MPEP 2144.03(C).

c) Claim 24

(iii) The Final Rejection has Failed to Establish a *Prima Facie* Case of Obviousness

Claim 24 is patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness.

Claim 24 recites a method for capturing flying insects that includes "generating an outflow, comprising an insect attractant dispersed therein" and "generating an inflow flowing into [the] trap" wherein the inflow and outflow have a counterflow relationship "wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said

outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow."

Because claim 24 is a method claim, the actual acts recited therein must be described in Cheshire, or the combination of Cheshire and Waters in order to constitute a *prima facie* case of obviousness. Cheshire, and the combination of Cheshire and Waters, fail to teach or suggest the claimed acts.

This language in claim 24 defines a type of counterflow relationship between the inflow and outflow that requires an overlapping region of the inflow to (a) overlap an overlapped region of the outflow, and (b) flow substantially counter to and immediately adjacent the overlapped region of the outflow. Insects attracted to the outflow will use the outflow to find its source, which they believe is the location of prey. As a result of this relationship, insects attracted to the device by the outflow and intersecting the overlapping region of the inflow will be drawn into the insect trap. While the insects may meander somewhat in their flight path, it is believed that the overlapping relationship enhances the ability to capture insects.

As argued above with respect to claim 1, this claimed relationship is completely lacking in Cheshire. The most relevant portion of Cheshire that describes how insects are drawn into its device is found at column 10, lines 3-47. Neither that portion of Cheshire nor any other portion of Cheshire discloses or even mentions the type of counterflow relationship recited in claim 24. Instead, Cheshire discloses that insects are drawn in from within a rectangular "killing zone" surrounded by the dashed line and indicated by point X in Fig. 4 (above). No overlapping relationship is disclosed between the inflow in this "killing zone" and the outflow flowing out the bottom of the device in Cheshire.

The final rejection argues that "Cheshire shows an inflow substantially counter to and immediately adjacent an upper portion of the plume and then into the trap such that insects are attracted to the outflow and flying along the upper portion of the plume towards the trap will intersect the inflow and be drawn into the inflow as discussed in column 2, lines 28-68 and column 8, lines 43-55." (Page 4). As mentioned above with respect to claim 1, this is a mischaracterization of the teachings of Cheshire. The cited portion of column two merely teaches that it may be desirable to include an inflow that is directed generally upwards, to avoid fighting the lift of the mosquitoes' upward reflexes. (Col. 2, ll. 46-50). There is no discussion in column two of any relationship between an inflow and an outflow, nor does it teach or suggest that the two flows should be counter and adjacent to each other. Cheshire contains no information at all regarding where insects might fly in relation to the outflow

plume as asserted in the final rejection. Neither does the section of column eight make up for the deficiencies of column 2. The referenced portion of column eight merely describes changes in the laminar inflow in the vicinity of flange 11. This inflow becomes turbulent at a distance from the flange 11 and mosquitoes already attracted to the device may be induced to engage in upward flight, thereby aiding the inflow in sucking the insects into range of the electric grid 20. These passages do not relate in any way to attracting insects to an outflow, nor to any counterflow relationship between the inflow and the outflow.

In fact, Cheshire fails to include any teaching at all regarding a role of the exhaust from the motor 25 in attracting insects. The only effect of the exhaust that is mentioned is that insects already attracted to the device may react to exhaust air flow by reflexively flying upward from beneath the device. (Col. 9, ll. 47-49). Instead, the primary airflow with which Cheshire is concerned is inflow. In particular, Cheshire seeks to ensure that the inflow is sufficient to suck in insects attracted by the light. (See, e.g., col. 8, ll. 24-55). In contrast to the "outflow comprising an insect attractant dispersed therein" as recited in claim 24 of the present application, the only attractant described in relationship to Cheshire's embodiment of Figures 1 and 2 is radiant light energy, generally in the ultraviolet portion of the spectrum, but also contemplating infrared wavelengths. (Col. 6, ll. 47-64). With respect to Cheshire's embodiment of Figure 3, radiant light energy is accompanied by the heat produced by an incandescent bulb and the motion of a rotating sleeve, but this embodiment still lacks any insect attractant dispersed within an outflow. (Col. 11, ll. 28-36, 60-66). Moreover, there is no teaching or suggestion in Cheshire (nor does the Office Action cite any such motivation) to combine aspects of these two embodiments in any way.

The Office Action fails even to allege that Cheshire teaches an outflow comprising an insect attractant dispersed therein. As discussed above with respect to claim 1, to the extent that the Office Action relies upon "motion and heat" there is no explanation of how the motion and heat of the embodiment of Figure 3 relate in any way to the embodiment of Figures 1 and 2, nor any assertion that motion or heat comprise "an insect attractant dispersed" within an outflow that flows downwardly and radially from the trap, this is because they do not.

Waters does not make up for the deficiencies of Cheshire. As described above, Waters merely teaches a device for producing carbon dioxide gas in conjunction with an insect trap. It does not teach any outflow or inflow, nor any relationship between the two. The carbon dioxide so produced flows upward through tube 14 into the trap. No mechanism is disclosed for causing this flow, nor for dispersing the carbon dioxide once it arrives in the

trap. Presumably, in view of the dry ice technology described in the background, simple diffusion of the carbon dioxide will suffice for the purpose of Waters.

The final rejection further states that, "it would have been obvious to provide Cheshire with a carbon dioxide attractant as shown by Waters to attract more insects to the trap." (Page 3). This statement is merely a *post hoc* justification for picking and choosing elements of Waters to combine with elements drawn from multiple embodiments of Cheshire and is entirely unsupported by evidence. As noted above, Cheshire does not teach that the outflow has anything at all to do with attracting insects. As a result, there can be no suggestion to add an attractant to the outflow, since Cheshire's outflow has nothing to do with insect attraction.

iv) The Final Rejection has Failed to Give Due Weight to the Invention's Commercial Success

With respect to commercial success, Appellant submits that the argument presented above with respect to claim 1 applies equally to claim 24 and that Appellant's submission meets the appropriate legal standard and should be considered in evaluating obviousness in view of the Cheshire and Waters references.

Thus, for at least the reasons that Cheshire and Waters fail to teach or suggest the counterflow relationship between the inflow and the outflow as recited by claim 24 or an outflow having an insect attractant dispersed therein, claim 24 is submitted to be patentable, and Appellant respectfully requests that the rejection be withdrawn.

d) Claims 25-34, 78 and 81

Each of claims 25-24, 78 and 81 is separately patentable at least for the reasons given above with respect to claim 24 from which they depend and for the additional features recited therein. Appellant notes that claims 28 and 31-34 appear to be the only ones of 25-24, 28 and 81 that are specifically addressed in the Final Rejection. To the extent that the other claims are not rejected with any specificity, Appellant submits that the Final Rejection fails to make a *prima facie* case of unpatentability and that these claims are therefore patentable.

The Final Rejection does not address "said generating...so that said inflow is part of said outflow," as recited in claim 28. Cheshire does not teach anything regarding an interrelationship between the inflow and the outflow, nor does Waters overcome this deficiency of Cheshire. Appellant therefore submits that claim 28 is patentable.

Claims 31-34 depend from claim 28 and are patentable at least for the same reasons as claim 28, and for the additional features recited therein.

e) Claim 39

Claim 39 is patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness.

Claim 39 recites a method for capturing flying insects that includes "generating an outflow, comprising an insect attractant dispersed therein" and "generating an inflow flowing into [the] trap" wherein the inflow and outflow have a counterflow relationship "wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to the overlapped region of said outflow."

Because claim 39 is a method claim, the actual acts recited therein must be described in Cheshire, or the combination of Cheshire and Waters in order to constitute a *prima facie* case of obviousness. Cheshire, and the combination of Cheshire and Waters, fail to teach or suggest the claimed acts.

This language in claim 39 defines a type of counterflow relationship between the inflow and outflow that requires an overlapping region of the inflow to (a) overlap an overlapped region of the outflow, and (b) flow substantially counter to the overlapped region of the outflow. Insects attracted to the outflow will use the outflow to find its source, which they believe is the location of prey. As a result of this relationship, insects attracted to the device by the outflow and intersecting the overlapping region of the inflow will be drawn into the insect trap. While the insects may meander somewhat in their flight path, it is believed that the overlapping relationship enhances the ability to capture insects.

As argued above with respect to claim 1, this claimed relationship is completely lacking in Cheshire. The most relevant portion of Cheshire that describes how insects are drawn into its device is found at column 10, lines 3-47. Neither that portion of Cheshire nor any other portion of Cheshire discloses or even mentions the type of counterflow relationship recited in claim 24. Instead, Cheshire discloses that insects are drawn in from within a rectangular "killing zone" delineated by the dashed line and indicated by point X in Fig. 4 (above). No overlapping relationship is disclosed between the inflow in this "killing zone" and the outflow flowing out the bottom of the device in Cheshire.

The final rejection argues that "Cheshire shows an inflow substantially counter to and immediately adjacent an upper portion of the plume and then into the trap such that insects are attracted to the outflow and flying along the upper portion of the plume towards the trap

will intersect the inflow and be drawn into the inflow as discussed in column 2, lines 28-68 and column 8, lines 43-55." (Page 4). As discussed above with respect to claim 1, the passages of Cheshire cited in the final rejection do not relate in any way to attracting insects to an outflow, nor to any counterflow relationship between the inflow and the outflow.

In fact, Cheshire fails to include any teaching at all regarding a role of the exhaust from the motor 25 in attracting insects. The only effect of the exhaust that is mentioned is that insects already attracted to the device may react to exhaust air flow by reflexively flying upward from beneath the device. (Col. 9, ll. 47-49). Instead, the primary airflow with which Cheshire is concerned is inflow. In particular, Cheshire seeks to ensure that the inflow is sufficient to suck in insects attracted by the light. (See, e.g., col. 8, ll. 24-55). In contrast to the "outflow comprising an insect attractant dispersed therein" as recited in claim 24 of the present application, the only attractant described in relationship to Cheshire's embodiment of Figures 1 and 2 is radiant light energy, generally in the ultraviolet portion of the spectrum, but also contemplating infrared wavelengths. (Col. 6, ll. 47-64). With respect to Cheshire's embodiment of Figure 3, radiant light energy is accompanied by the heat produced by an incandescent bulb and the motion of a rotating sleeve, but this embodiment still lacks any insect attractant dispersed within an outflow. (Col. 11, ll. 28-36, 60-66). Moreover, there is no teaching or suggestion in Cheshire (nor does the Office Action cite any such motivation) to combine aspects of these two embodiments in any way. Cheshire's failure to teach an insect attractant dispersed in an outflow is fully discussed above with respect to claims 1 and 24.

Waters does not make up for the deficiencies of Cheshire. As described above, Waters merely teaches a device for producing carbon dioxide gas in conjunction with an insect trap. It does not teach any outflow or inflow, nor any relationship between the two. The carbon dioxide so produced flows upward through tube 14 into the trap. No mechanism is disclosed for causing this flow, nor for dispersing the carbon dioxide once it arrives in the trap. Presumably, in view of the dry ice technology described in the background, simple diffusion of the carbon dioxide will suffice for the purpose of Waters.

The final rejection states that, "it would have been obvious to provide Cheshire with a carbon dioxide attractant as shown by Waters to attract more insects to the trap." (Page 3). As has been discussed above, this statement is merely an unsupported *post hoc* justification for picking and choosing elements of Waters to combine with elements drawn from multiple embodiments of Cheshire.

With respect to commercial success, Appellant submits that the argument presented above with respect to claim 1 applies equally to claim 39 and that Appellant's submission meets the appropriate legal standard and should be considered in evaluating obviousness in view of the Cheshire and Waters references.

Thus, for at least the reasons that Cheshire and Waters fail to teach or suggest the counterflow relationship between the inflow and the outflow as recited by claim 39 or an outflow having an insect attractant dispersed therein, claim 39 is submitted to be patentable, and Appellant respectfully requests that the rejection be withdrawn.

f) Claims 40-49, 79 and 82

Each of claims 40-49, 79 and 82 is separately patentable at least for the reasons given above with respect to claim 39 from which they depend and for the additional features recited therein. Appellant notes that none of these claims is specifically addressed in the Final Rejection. To the extent that the other claims are not rejected with any specificity, Appellant submits that the Final Rejection fails to make a *prima facie* case of unpatentability and that these claims are therefore patentable.

g) Claim 50

Appellant respectfully submits claim 50 is patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness.

Claim 50 recites a device for capturing flying insects that includes an airflow generator, an outflow opening and an inlet opening, the "airflow generator generat[es an] outflow comprising an insect attractant dispersed therein and ... an inflow." The inflow and the outflow are generated "in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow."

This language in claim 50 defines a type of counterflow relationship between the inflow and outflow that requires an overlapping region of the inflow to (a) overlap an overlapped region of the outflow, and (b) flow substantially counter to and immediately adjacent the overlapped region of the outflow. Insects attracted to the outflow will use the outflow to find its source, which they believe is the location of prey. As a result of this relationship, insects attracted to the device by the outflow and intersecting the overlapping

region of the inflow will be drawn into the insect trap. While the insects may meander somewhat in their flight path, it is believed that the overlapping relationship enhances the ability to capture insects.

This claimed relationship is completely lacking in Cheshire. The most relevant portion of Cheshire that describes how insects are drawn into its device is found at column 10, lines 3-47. Neither that portion of Cheshire nor any other portion of Cheshire discloses or even mentions the type of counterflow relationship recited in claim 50. Instead, Cheshire discloses that insects are drawn in from within a "killing zone" defined by the dashed line and indicated by the X in Fig. 4. No overlapping relationship is disclosed between the inflow in this "killing zone" and the outflow flowing out the bottom of the device in Cheshire.

The final rejection argues that "Cheshire shows an inflow substantially counter to and immediately adjacent an upper portion of the plume and then into the trap such that insects are attracted to the outflow and flying along the upper portion of the plume towards the trap will intersect the inflow and be drawn into the inflow as discussed in column 2, lines 28-68 and column 8, lines 43-55." (Page 4). This is a mischaracterization of the teachings of Cheshire. As discussed above with respect to claims 1 and 24, the cited passages of Cheshire do not relate in any way to attracting insects to an outflow, nor to any counterflow relationship between the inflow and the outflow.

In fact, Cheshire fails to include any teaching at all regarding a role of the exhaust from the motor 25 in attracting insects. The only effect of the exhaust that is mentioned is that insects already attracted to the device may react to exhaust air flow by reflexively flying upward from beneath the device. (Col. 9, ll. 47-49). Instead, the primary airflow with which Cheshire is concerned is inflow. In particular, Cheshire seeks to ensure that the inflow is sufficient to suck in insects attracted by the light. (See, e.g., col. 8, ll. 24-55). In contrast to the "outflow comprising an insect attractant dispersed therein" as recited in claim 1 of the present application, the only attractant described in relationship to Cheshire's embodiment of Figures 1 and 2 is radiant light energy, generally in the ultraviolet portion of the spectrum, but also contemplating infrared wavelengths. (Col. 6, ll. 47-64). With respect to Cheshire's embodiment of Figure 3, radiant light energy is accompanied by the heat produced by an incandescent bulb and the motion of a rotating sleeve, but this embodiment still lacks any insect attractant dispersed within an outflow. (Col. 11, ll. 28-36, 60-66). Moreover, there is no teaching or suggestion in Cheshire (nor does the Office Action cite any such motivation) to combine aspects of these two embodiments in any way. This has also been discussed in detail above with respect to claims 1 and 24.

Waters does not make up for the deficiencies of Cheshire. As described above, Waters merely teaches a device for producing carbon dioxide gas in conjunction with an insect trap. It does not teach any outflow or inflow, nor any relationship between the two. The carbon dioxide so produced flows upward through tube 14 into the trap. No mechanism is disclosed for causing this flow, nor for dispersing the carbon dioxide once it arrives in the trap. Presumably, in view of the dry ice technology described in the background, simple diffusion of the carbon dioxide will suffice for the purpose of Waters.

The final rejection states that, "it would have been obvious to provide Cheshire with a carbon dioxide attractant as shown by Waters to attract more insects to the trap." (Page 3). As argued above, this unsupported statement is merely a *post hoc* justification for picking and choosing elements of Waters to combine with elements drawn from multiple embodiments of Cheshire.

With respect to commercial success, Appellant submits that the argument presented above with respect to claim 1 applies equally to claim 50 and that Appellant's submission meets the appropriate legal standard and should be considered in evaluating obviousness in view of the Cheshire and Waters references.

Thus, for at least the reasons that Cheshire and Waters fail to teach or suggest the counterflow relationship between the inflow and the outflow as recited by claim 50 or an outflow having an insect attractant dispersed therein, claim 50 is submitted to be patentable, and Appellant respectfully requests that the rejection be withdrawn.

h) Claims 40-49, 79 and 82

Each of claims 40-49, 79 and 82 is separately patentable at least for the reasons given above with respect to claim 50 from which they depend and for the additional features recited therein. Appellant notes that none of these claims is specifically addressed in the Final Rejection. To the extent that the other claims are not rejected with any specificity, Appellant submits that the Final Rejection fails to make a *prima facie* case of unpatentability and that these claims are therefore patentable.

i) Claim 83

Appellant respectfully submits claim 83 is patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness.

Claim 83 recites a device for capturing flying insects that includes an airflow generator, an outflow opening and an inlet opening, the "airflow generator generat[es an] outflow comprising an insect attractant dispersed therein and ... an inflow." The inflow and the outflow are generated "such that, outside said device, said inflow extends substantially to or below an elevation of the outflow opening."

This language in claim 83 defines a type of relationship between the inflow and the outflow opening that requires that the inflow extends substantially to or below an elevation of the outflow opening. Insects attracted to the outflow will use the outflow to find its source, which they believe is the location of prey. Because the inflow extends to or below the elevation of the outflow opening, insects attracted to the device by the outflow and flying near an elevation of the outflow opening will be drawn into the insect trap. While the insects may meander somewhat in their flight path, it is believed that the recited relationship enhances the ability to capture insects.

This claimed relationship is completely lacking in Cheshire. The most relevant portion of Cheshire that describes how insects are drawn into its device is found at column 10, lines 3-47. Neither that portion of Cheshire nor any other portion of Cheshire discloses or even mentions that an inflow extends substantially to or below an elevation of the outflow opening. Instead, Cheshire discloses that insects are drawn in from within a "killing zone," the rectangular region at X in Fig. 4 (above). The killing zone is spaced apart from the outflow opening at the bottom of the device in Cheshire and Figs. 2 and 4 do not teach or suggest that the inflow extends even below the upper half of Cheshire's device, let alone to a point substantially to or below the elevation of the outflow opening.

Furthermore, as noted above with respect to claim 1, Cheshire does not teach or suggest an attractant dispersed within the exhaust plume or indeed any role of the exhaust plume in attracting insects.

The final rejection fails to assert that the recited relationship between the inflow and the outflow opening is present in Cheshire. Appellant notes that this failure amounts to a failure to make a *prima facie* case of unpatentability as at least one recited element is not addressed by the rejection. Appellant has already specifically addressed the patentability of these claims in the response filed November 4, 2004. Specifically, Appellant noted that Cheshire does not relate the inflow to the elevation of the outflow opening as discussed above, and the Final Rejection contains no response to this assertion. Appellant therefore submits that claim 83 is patentable.

Waters does not make up for the deficiencies of Cheshire. As described above, Waters merely teaches a device for producing carbon dioxide gas in conjunction with an insect trap. It does not teach any outflow or inflow, nor any relationship between the inflow and the outflow opening.

With respect to the asserted combination of Waters and Cheshire, Appellant submits that there is no motivation to combine the two as thoroughly discussed above with respect to claim 1.

With respect to commercial success, Appellant submits that the argument presented above with respect to claim 1 applies equally to claim 83 and that Appellant's submission meets the appropriate legal standard and should be considered in evaluating obviousness in view of the Cheshire and Waters references.

Thus, for at least the reasons that Cheshire and Waters fail to teach or suggest the recited relationship between the inflow and the outflow opening as recited by claim 83 or an outflow having an insect attractant dispersed therein, and that Cheshire and Waters cannot be properly combined, claim 83 is submitted to be patentable, and Appellant respectfully requests that the rejection be withdrawn.

h) Claims 84-111

Each of claims 84-111 is separately patentable at least for the reasons given above with respect to claim 83 from which they depend and for the additional features recited therein. Appellant notes that none of these claims is specifically addressed in the Final Rejection. As a result, the Final Rejection fails to make a *prima facie* case of unpatentability and these claims are therefore patentable.

i) Claim 112

Appellant respectfully submits claim 112 is patentable over the asserted combination of Cheshire and Waters at least because 1) the prior art references, when combined, do not teach or suggest all the claim limitations, 2) there is no motivation or suggestion to combine the cited references in the asserted manner and 3) the commercial success of products sold in accordance with the claims of the present application constitutes evidence of non-obviousness.

Claim 112 recites a method for capturing flying insects that includes "generating an outflow, comprising an insect attractant dispersed therein and ... an inflow." The inflow and the outflow are generated "such that, outside said device, said inflow extends substantially to or below an elevation of the outflow opening."

This language in claim 112 defines a type of relationship between the inflow and the outflow opening that requires that the inflow extends substantially to or below an elevation of the outflow opening. Insects attracted to the outflow will use the outflow to find its source, which they believe is the location of prey. Because the inflow extends to or below the elevation of the outflow opening, insects attracted to the device by the outflow and flying near an elevation of the outflow opening will be drawn into the insect trap. While the insects may meander somewhat in their flight path, it is believed that the recited relationship enhances the ability to capture insects.

As discussed above with respect to claim 83, this claimed relationship is completely lacking in Cheshire. The most relevant portion of Cheshire that describes how insects are drawn into its device is found at column 10, lines 3-47. Neither that portion of Cheshire nor any other portion of Cheshire discloses or even mentions that an inflow extends substantially to or below an elevation of the outflow opening. Instead, Cheshire discloses that insects are drawn in from within a "killing zone" indicated by point X in Fig. 4. The killing zone is spaced apart from the outflow opening at the bottom of the device in Cheshire and Figs. 2 and 4 do not teach or suggest that the inflow extends even below the upper half of Cheshire's device.

The final rejection does not even assert that the recited relationship is present in Cheshire. Appellant notes that this failure amounts to a failure to make a *prima facie* case of unpatentability as at least one recited element is not addressed by the rejection. Appellant has already specifically addressed the patentability of these claims in the response filed November 4, 2004. Specifically, Appellant noted that Cheshire does not relate the inflow to the elevation of the outflow opening as discussed above, and the Final Rejection contains no response to this assertion, therefore, Appellant submits that claim 112 is patentable.

Waters does not make up for the deficiencies of Cheshire. As described above, Waters merely teaches a device for producing carbon dioxide gas in conjunction with an insect trap. It does not teach any outflow or inflow, nor any relationship between the inflow and the outflow opening.

With respect to the asserted combination of Waters and Cheshire, Appellant submits that there is no motivation to combine the two as thoroughly discussed above with respect to claim 1.

With respect to commercial success, Appellant submits that the argument presented above with respect to claim 1 applies equally to claim 112 and that Appellant's submission

meets the appropriate legal standard and should be considered in evaluating obviousness in view of the Cheshire and Waters references.

Thus, for at least the reasons that Cheshire and Waters fail to teach or suggest the recited relationship between the inflow and the outflow opening as recited by claim 112 or an outflow having an insect attractant dispersed therein, and that Cheshire and Waters cannot be properly combined, claim 112 is submitted to be patentable, and Appellant respectfully requests that the rejection be withdrawn.

j) Claims 113-123

Each of claims 113-123 is separately patentable at least for the reasons given above with respect to claim 112 from which they depend and for the additional features recited therein. Appellant notes that none of these claims is specifically addressed in the Final Rejection. As a result, the Final Rejection fails to make a *prima facie* case of unpatentability and these claims are therefore patentable.

3. The Terminal Disclaimer Filed November 4, 2004 Obviates the Double Patenting Rejection

Appellant respectfully submits that the terminal disclaimer filed November 4, 2004 obviates the double patenting rejection. A nonstatutory double patenting rejection may be overcome by filing a terminal disclaimer in compliance with 37 C.F.R. 1.321(c), provided that the patent can be shown to be commonly owned with the present application. See 37 C.F.R. 1.130(b). On November 4, 2004, Applicant filed a terminal disclaimer referring to the recorded assignment of the '249 application, proving common ownership. The terminal disclaimer is noted at page 6 of the Office Action, but the double patenting rejection is apparently maintained at page 2. Because the Office Action does not point out any procedural errors with respect to this terminal disclaimer, Appellant respectfully requests that the double patenting rejection be withdrawn.

V. CONCLUSION

For at least the reasons discussed above, it is respectfully submitted that claims 1-123 are not rendered obvious by the cited references and that the Terminal Disclaimer filed previously overcomes the double patenting rejection. For the above reasons, Appellant respectfully requests this Honorable Board to reverse the rejections of the claims.

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VI. CLAIMS APPENDIX - 37 C.F.R. §41.37(c)(1)(viii)

Claims 1-123 are as follows:

1. A device for capturing flying insects, said device comprising:

an insect trap;

an airflow generator generating (a) an outflow comprising an insect attractant dispersed therein and (b) an inflow;

an outflow opening communicated to said airflow generator, said outflow opening enabling said outflow to flow outwardly from said device and spread downwardly and radially from said device; and

an inlet opening communicated to said airflow generator and said insect trap and positioned vertically higher than said outlet opening, said airflow generator drawing said inflow into said trap via said inlet opening such that insects intersecting said inflow are drawn into said trap;

said airflow generator generating said inflow and said outflow in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow.

2. A device according to claim 1, wherein said outflow opening faces downwardly and directs said outflow downwardly.

3. A device according to claim 2, further comprising a tubular member having an open lower end providing said outflow opening.

4. A device according to claim 3, further comprising a cover member positioned with respect to said tubular member such that an edge portion of said cover member is spaced from said tubular member to define said inlet opening,

said tubular member having an open upper end in communication with said inlet opening to enable said inflow to flow through said tubular member and out said open lower end as part of said outflow.

5. A device according to claim 4, wherein said cover member is a tubular housing comprising a top wall and a tubular wall extending downwardly from said top wall,

said tubular housing being positioned over said tubular member such that said tubular wall extends downwardly alongside said tubular member to define said inlet as an annular downwardly facing opening between said edge portion and said tubular member.

6. A device according to claim 4, wherein said airflow generator comprises a fan.

7. A device according to claim 6, wherein said fan is a single fan.

8. A device according to claim 7, wherein said fan is positioned within said tubular member.

9. A device according to claim 8, wherein said insect trap is positioned within said tubular member.

10. A device according to claim 9, wherein said insect trap is a flexible mesh structure.

11. A device according to claim 10, wherein said mesh structure is positioned above said fan.

12. A device according to claim 11, wherein said insect attractant is carbon dioxide.

13. A device according to claim 12, wherein said carbon dioxide is supplied to said tubular member at a point higher than said fan.

14. A device according to claim 13, further comprising a tank containing said carbon dioxide and a hose supplying said carbon dioxide to said tubular member from said tank.

15. A device according to claim 14, wherein said hose supplies said carbon dioxide directly to said tubular member.

16. A device according to claim 15, wherein said tubular member has a port formed therethrough and said hose is connected to said port.

17. A device according to claim 1, wherein said airflow generator comprises a fan.

18. A device according to claim 17, wherein said airflow generator is a single fan.

19. A device according to claim 17, wherein said airflow generator comprises multiple fans.

20. A device according to claim 19, wherein said multiple fans is two fans, one of said fans generating said inflow, the other of said fans generating said outflow.

21. A device according to claim 1, wherein said insect trap is a flexible mesh structure.

22. A device according to claim 1, wherein said insect attractant is carbon dioxide.

23. A device according to claim 22, further comprising a tank containing said carbon dioxide.

24. A method for capturing flying insects using a device for capturing flying insects, said device comprising an insect trap; said method comprising:

generating an outflow, comprising an insect attractant dispersed therein, flowing outwardly from said device and spreading downwardly and radially from said device; and

generating an inflow flowing into said trap such that insects intersecting said inflow are drawn into said trap;

wherein said inflow and said outflow are generated in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow.

25. A method according to claim 24, wherein said device includes an airflow generator, an outflow opening communicated with said airflow generator, and an inflow opening communicated with said insect trap and said airflow generator,

said generating said inflow and said generating said outflow being performed by said airflow generator.

26. A method according to claim 25, wherein said outflow opening faces downwardly and wherein said outflow opening directs said outflow downwardly.

27. A method according to claim 26, wherein said device further comprises a tubular member having an open lower end providing said outflow opening; said generating said outflow including directing said outflow through said open lower end.

28. A method according to claim 27, wherein said device further comprises a cover member positioned with respect to said tubular member such that an edge portion of said cover member is spaced from said tubular member to define said inlet opening, said tubular member having an open upper end in communication with said inlet opening;

said generating said outflow and said generating said inflow being performed by drawing said inflow in through said inlet opening into said open upper end and then out through said open lower end so that said inflow is part of said outflow.

29. A method according to claim 28, wherein said cover member is a tubular housing comprising a top wall and a tubular wall extending downwardly from said top wall, said tubular housing being positioned over said tubular member such that said tubular wall extends downwardly alongside said tubular member to define said inlet opening as an annular downwardly facing opening between said edge portion and said tubular member,

said generating said inflow including drawing said inflow upwardly from said inlet opening between said tubular wall and said tubular member and then into said open upper end of said tubular member.

30. A method according to claim 28, wherein said airflow generator comprises a single fan and wherein both generating said inflow and generating said outflow is performed by operating said fan.

31. A method according to claim 30, wherein said insect attractant is carbon dioxide and said method further comprises supplying said carbon dioxide to said tubular member.

32. A method according to claim 31, wherein said fan is positioned within said tubular member and wherein said carbon dioxide is supplied at a point higher than said fan.

33. A method according to claim 32, wherein said carbon dioxide is supplied directly to said tubular member.

34. A method according to claim 31, wherein said carbon dioxide is supplied directly to said tubular member.

35. A device according to claim 3, wherein said insect attractant is carbon dioxide.

36. A device according to claim 35, further comprising a tank containing said carbon dioxide.

37. A device according to claim 36, further comprising a hose supplying said carbon dioxide from said tank to said tubular member.

38. A device according to claim 37 wherein said hose supplies said carbon dioxide directly to said tubular member.

39. A method for capturing flying insects using a device for capturing flying insects, said device comprising an insect trap; said method comprising:

generating an outflow, comprising an insect attractant dispersed therein, flowing outwardly from said device and spreading downwardly and radially from said device; and

generating an inflow flowing such that insects intersecting said inflow are drawn into said trap;

wherein said inflow and said outflow are generated in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to the overlapped region of said outflow.

40. A method according to claim 39, wherein said device includes an airflow generator, an outflow opening communicated with said airflow generator, and an inflow opening communicated with said insect trap and said airflow generator,

said generating said inflow and said generating said outflow being performed by said airflow generator.

41. A method according to claim 40, wherein said outflow opening faces downwardly and wherein said outflow opening directs said outflow downwardly to create said plume.

42. A method according to claim 41, wherein said device further comprises a tubular member having an open lower end providing said outflow opening; said generating said outflow including directing said outflow through said open lower end.

43. A method according to claim 42, wherein said device further comprises a cover member positioned with respect to said tubular member such that an edge portion of said cover member is spaced from said tubular member to define said inlet opening, said tubular member having an open upper end in communication with said inlet opening;

said generating said outflow and said generating said inflow being performed by drawing said inflow in through said inlet opening into said open upper end and then out through said open lower end so that said inflow is part of said outflow.

44. A method according to claim 43, wherein said cover member is a tubular housing comprising a top wall and a tubular wall extending downwardly from said top wall, said tubular housing being positioned over said tubular member such that said tubular wall extends downwardly alongside said tubular member to define said inlet opening as an annular downwardly facing opening between said edge portion and said tubular member,

said generating said inflow including drawing said inflow upwardly from said inlet opening between said tubular wall and said tubular member and then into said open upper end of said tubular member.

45. A method according to claim 43, wherein said airflow generator comprises a single fan and wherein both generating said inflow and generating said outflow is performed by operating said fan.

46. A method according to claim 45, wherein said insect attractant is carbon dioxide and said method further comprises supplying said carbon dioxide to said tubular member.

47. A method according to claim 46, wherein said fan is positioned within said tubular member and wherein said carbon dioxide is supplied at a point higher than said fan.

48. A method according to claim 47, wherein said carbon dioxide is supplied directly to said tubular member.

49. A method according to claim 48, wherein said carbon dioxide is supplied directly to said tubular member.

50. A device for capturing flying insects, said device comprising:

an insect trap;

an airflow generator generating (a) an outflow comprising an insect attractant dispersed therein and (b) an inflow;

an outflow opening communicated to said airflow generator, said outflow opening enabling said outflow to flow outwardly from said device and spread downwardly and radially from said device; and

an inlet opening communicated to said airflow generator and said insect trap and positioned vertically higher than said outlet opening, said airflow generator drawing said inflow into said trap via said inlet opening such that insects intersecting said inflow are drawn into said trap;

said airflow generator generating said inflow and said outflow in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to the overlapped region of said outflow.

51. A device according to claim 50, wherein said outflow opening faces downwardly and directs said outflow downwardly.

52. A device according to claim 51, further comprising a tubular member having an open lower end providing said outflow opening.

53. A device according to claim 52, further comprising a cover member positioned with respect to said tubular member such that an edge portion of said cover member is spaced from said tubular member to define said inlet opening,

said tubular member having an open upper end in communication with said inlet opening to enable said inflow to flow through said tubular member and out said open lower end as part of said outflow.

54. A device according to claim 53, wherein said cover member is a tubular housing comprising a top wall and a tubular wall extending downwardly from said top wall,

said tubular housing being positioned over said tubular member such that said tubular wall extends downwardly alongside said tubular member to define said inlet as an annular downwardly facing opening between said edge portion and said tubular member.

55. A device according to claim 53, wherein said airflow generator comprises a fan.

56. A device according to claim 55, wherein said fan is a single fan.

57. A device according to claim 56, wherein said fan is positioned within said tubular member.

58. A device according to claim 57, wherein said insect trap is positioned within said tubular member.

59. A device according to claim 58, wherein said insect trap is a flexible mesh structure.

60. A device according to claim 59, wherein said mesh structure is positioned above said fan.

61. A device according to claim 59, wherein said insect attractant is carbon dioxide.

62. A device according to claim 61, wherein said carbon dioxide is supplied to said tubular member at a point higher than said fan.

63. A device according to claim 62, further comprising a tank containing said carbon dioxide and a hose supplying said carbon dioxide to said tubular member from said tank.

64. A device according to claim 63, wherein said hose supplies said carbon dioxide directly to said tubular member.

65. A device according to claim 64, wherein said tubular member has a port formed therethrough and said hose is connected to said port.

66. A device according to claim 50, wherein said airflow generator comprises a fan.

67. A device according to claim 66, wherein said airflow generator is a single fan.

68. A device according to claim 66, wherein said airflow generator comprises multiple fans.

69. A device according to claim 68, wherein said multiple fans is two fans, one of said fans generating said inflow, the other of said fans generating said outflow.

70. A device according to claim 50, wherein said insect trap is a flexible mesh structure.

71. A device according to claim 50, wherein said insect attractant is carbon dioxide.

72. A device according to claim 71, further comprising a tank containing said carbon dioxide.

73. A device according to claim 52, wherein said insect attractant is carbon dioxide.

74. A device according to claim 73, further comprising a tank containing said carbon dioxide.

75. A device according to claim 74, further comprising a hose supplying said carbon dioxide from said tank to said tubular member.

76. A device according to claim 75, wherein said hose supplies said carbon dioxide directly to said tubular member.

77. A device according to claim 1, wherein said outflow comprises an effective amount of the insect attractant dispersed therein.

78. A method according to claim 24, wherein said outflow comprises an effective amount of the insect attractant dispersed therein.

79. A method according to claim 39, wherein said outflow comprises an effective amount of the insect attractant dispersed therein.

80. A device according to claim 50, wherein said outflow comprises an effective amount of the insect attractant dispersed therein.

81. A method according to claim 24, wherein said insect attractant is carbon dioxide.

82. A method according to claim 39, wherein said insect attractant is carbon dioxide.

83. A device for capturing flying insects, comprising:

an insect trap;

an airflow generator generating (a) an outflow comprising an insect attractant dispersed therein and (b) an inflow;

an outflow opening communicated to said airflow generator, said outflow opening enabling said outflow to flow outwardly from said device; and

an inflow opening communicated to said airflow generator and said insect trap, said airflow generator drawing said inflow into said trap such that insects intersecting said inflow are drawn into said trap;

said airflow generator generating said inflow and said outflow such that, outside said device, said inflow extends substantially to or below an elevation of the outflow opening.

84. A device according to claim 83, wherein said airflow generator generates said inflow and said outflow in a counterflow relationship wherein, outside the device, an overlapping region of said inflow overlaps an overlapped region of said outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow.

85. A device according to claim 83, wherein said outflow opening faces downwardly and directs said outflow downwardly.

86. A device according to claim 85, further comprising a tubular member having an open lower end providing said outflow opening.

87. A device according to claim 86, further comprising a cover member positioned with respect to said tubular member such that an edge portion of said cover member is spaced from said tubular member to define said inlet opening,

said tubular member having an open upper end in communication with said inlet opening to enable said inflow to flow through said tubular member and out said open lower end as part of said outflow.

88. A device according to claim 87, wherein said cover member is a tubular housing comprising a top wall and a tubular wall extending downwardly from said top wall,

said tubular housing being positioned over said tubular member such that said tubular wall extends downwardly alongside said tubular member to define said inlet as an annular downwardly facing opening between said edge portion and said tubular member.

89. A device according to claim 86, wherein said airflow generator comprises a fan.

90. A device according to claim 89, wherein said fan is a single fan.

91. A device according to claim 90, wherein said fan is positioned within said tubular member.

92. A device according to claim 91, wherein said insect trap is positioned within said tubular member.

93. A device according to claim 92, wherein said insect trap is a flexible mesh structure.

94. A device according to claim 93, wherein said mesh structure is positioned above said fan.

95. A device according to claim 94, wherein said insect attractant is carbon dioxide.

96. A device according to claim 95, wherein said carbon dioxide is supplied to said tubular member at a point higher than said fan.

97. A device according to claim 96, further comprising a tank containing said carbon dioxide and a hose supplying said carbon dioxide to said tubular member from said tank.

98. A device according to claim 97, wherein said hose supplies said carbon dioxide directly to said tubular member.

99. A device according to claim 98, wherein said tubular member has a port formed therethrough and said hose is connected to said port.

100. A device according to claim 83, wherein said airflow generator comprises a fan.

101. A device according to claim 100, wherein said airflow generator is a single fan.

102. A device according to claim 100, wherein said airflow generator comprises multiple fans.

103. A device according to claim 102, wherein said multiple fans is two fans, one of said fans generating said inflow, the other of said fans generating said outflow.

104. A device according to claim 83, wherein said insect trap is a flexible mesh structure.

105. A device according to claim 83, wherein said insect attractant is carbon dioxide.

106. A device according to claim 105, further comprising a tank containing said carbon dioxide.

107. A device according to claim 86, wherein said insect attractant is carbon dioxide.

108. A device according to claim 107, further comprising a tank containing said carbon dioxide.

109. A device according to claim 108, further comprising a hose supplying said carbon dioxide from said tank to said tubular member.

110. A device according to claim 109 wherein said hose supplies said carbon dioxide directly to said tubular member.

111. A device according to claim 83, wherein said outflow comprises an effective amount of the insect attractant dispersed therein.

112. A method for capturing flying insects using a device for capturing flying insects, said device comprising an insect trap; said method comprising:

generating an outflow, comprising an insect attractant dispersed therein, flowing outwardly from an outflow opening on said device;

generating an inflow flowing into said trap such that insects intersecting said inflow are drawn into said trap;

wherein said inflow and said outflow are generated such that, outside said device, said inflow extends substantially to or below an elevation of the outflow opening.

113. A method according to claim 112, wherein said inflow and said outflow are generated in a counterflow relationship wherein, outside the device, an overlapping region of

said inflow overlaps an overlapped region of said outflow and flows substantially counter to and immediately adjacent the overlapped region of said outflow.

114. A method according to claim 112, wherein said device includes an airflow generator, an outflow opening communicated with said airflow generator, and an inflow opening communicated with said insect trap and said airflow generator,

said generating said inflow and said generating said outflow being performed by said airflow generator.

115. A method according to claim 114, wherein said outflow opening faces downwardly and wherein said outflow opening directs said outflow downwardly to create said plume.

116. A method according to claim 115, wherein said device further comprises a tubular member having an open lower end providing said outflow opening; said generating said outflow including directing said outflow through said open lower end.

117. A method according to claim 116, wherein said device further comprises a cover member positioned with respect to said tubular member such that an edge portion of said cover member is spaced from said tubular member to define said inlet opening, said tubular member having an open upper end in communication with said inlet opening;

said generating said outflow and said generating said inflow being performed by drawing said inflow in through said inlet opening into said open upper end and then out through said open lower end so that said inflow is part of said outflow.

118. A method according to claim 117, wherein said cover member is a tubular housing comprising a top wall and a tubular wall extending downwardly from said top wall, said tubular housing being positioned over said tubular member such that said tubular wall extends downwardly alongside said tubular member to define said inlet opening as an annular downwardly facing opening between said edge portion and said tubular member,

said generating said inflow including drawing said inflow upwardly from said inlet opening between said tubular wall and said tubular member and then into said open upper end of said tubular member.

119. A method according to claim 117, wherein said airflow generator comprises a single fan and wherein both generating said inflow and generating said outflow is performed by operating said fan.

120. A method according to claim 119, wherein said insect attractant is carbon dioxide and said method further comprises supplying said carbon dioxide to said tubular member.

121. A method according to claim 120, wherein said fan is positioned within said tubular member and wherein said carbon dioxide is supplied at a point higher than said fan.

122. A method according to claim 112, wherein said outflow comprises an effective amount of the insect attractant dispersed therein.

123. A method according to claim 112, wherein said insect attractant is carbon dioxide.

VII. EVIDENCE APPENDIX - 37 C.F.R. §41.37(c)(1)(ix)

A copy of a Declaration of Commercial Success is attached hereto as Appendix A. The Examiner acknowledged entry of this declaration in the Final Rejection mailed January 28, 2005. Appellant is unable to determine whether Exhibit H was properly submitted with the November 4, 2004 response. Regardless, the Declaration clearly included the factual assertion that the ITC made a finding of commercial success of Appellant's products. Exhibit H merely serves to confirm the fact already in evidence. Furthermore, Appellant notes that Exhibit H may still be considered as pertaining to a related judicial proceeding identified under §41.37(c)(1)(ii).

VIII. RELATED PROCEEDINGS APPENDIX - §41.37(c)(1)(x)

A copy of the Board's Decision on Appeal No. 2000-1914, decided January 29, 2001 is attached hereto as Appendix B.